gently liable. The terms of this contract have never been waived, relaxed or modified. The defendants have shown an express violation of one or more of the conditions upon which the liability was to depend. And yet it has been adjudged, although it is evident that it has been done with reluctance and against the better judgment of the court making the decision, that the proof of these violations constituted no defence to the action. The judgment should be reversed and a new trial granted, with costs to abide the event.

In the District Court of Philadelphia.

PENROSE *vs.* THE ERIE CANAL COMPANY.

1. The funds of an insolvent corporation in the hands of a banker, are liable to execution attachment by a creditor of the corporation, and it is no defence that the banker is also a creditor of the corporation to an amount exceeding the funds in his hands.
2. Money of a company deposited by the treasurer as such, is the money of the corporation in the hands of the banker.

This was a motion for a new trial and judgment on points reserved at the trial. The necessary facts appear in the opinion of

SHARSWOOD, P. J.—This is an attachment execution issued on a judgment against the Erie Canal Company, and served on Chas. M. Reed. From the answers of the garnishees and the other evidence, all documentary, produced on the trial, it appears that David McAlister, the treasurer of the company defendant, keeps an account with Mr. Reed—depositing his moneys with him—and the collectors of tolls also paying their money to Mr. Reed to the credit of the account of the treasurer. The Erie Canal Company is insolvent, unable to pay the principal or even interest of its bonds which have matured.

The most it has been able to do, after providing for current expenses and necessary repairs, has been to pay three per cent. to its bondholders on account of interest. Mr. Reed is the president of the company, the largest stockholder, and holds of its bonds, matured and unpaid, to the amount of $500,000 and upwards. The plaintiff's judgment is for the principal of bonds of the same character.

It will be best to consider the points of the case as they were presented in the able argument of the gentleman from Erie, who appeared on behalf of the garnishee. It exhausted all that could be said on the subject.

It was contended, in the first place, that General Reed was the debtor of David McAlister, not of the Erie Canal Company. But is this so? If sued by the company, must not a recovery be had against the garnishee—could he set-off a debt due by McAlister? If McAlister were superseded and a new treasurer appointed, with notice to General Reed, could he any longer honor with safety Mr. McAlister's checks? It is answer enough to this question to say, that the money deposited with Mr. Reed is the money of the company, and he knows it. The account is kept in the name of David McAlister, treasurer, and his receipts show that he received the money for the uses and purposes of the company, and to be accounted for to them. There is nothing, then, in this first point,—it is the ordinary case of a debt due to a corporation.

The second ground taken is, that the funds in General Reed's hands is simply money in the treasury, and not therefore liable to attachment. It may be that the money of a corporation, in the safe keeping of its cashier, treasurer or other officer, is not liable to attachment. Money in the cashier's pocket or strong box is in the pocket or strong-box of the corporation—he is but a servant, not a debtor of the corporation. Were he robbed, he could plead the loss, without negligence on his part, in discharge.

But suppose General Reed were robbed, does he say that he kept the money of the company in a box or bag, by itself, distinguished from his own, so that if lost by fire or robbery he would be discharged? He could no more do so than a debtor could plead any calamity or loss he had met with to excuse the payment of his debt. Their funds he holds as a banker, mixed with his own, not as the servant of the company or of the treasurer.

It will make this point stronger, though strong enough without, to add, that for more than enough to pay plaintiff's claim, General Reed was under contract to pay interest.

The third point was that an attachment will not lie against an insolvent corporation; or, perhaps as it was modified, an insolvent

corporation entrusted with the construction and management of some public highway or improvement.

But where is the authority for this position to be found? No distinction, as far as attachments are concerned, is made between improvement and other corporations, although, in the process of sequestration, such a distinction is made between municipal and other corporations. The reference to the act of 1836 in the act of 1845, is too vague to justify us in incorporating the proviso as to sequestration on the process of attachment. The reference is more fit to those sections of the act of 1836 which regulate attachments. Nor do the special acts passed in reference to sequestrations against this company, at all reach this process.

I have thus disposed of all the points but one, which was considered by the counsel under the first head—That General Reed instead of being the *debtor*, was in fact the *creditor* of defendants to an amount much larger than all the funds in his hands.

The answer is that there is fairly to be implied from the relation of banker to the company, as well as the terms of his receipts, that he was not to plead a set-off, but to account for and pay over whatever moneys thus came to his hands as banker; but a contract, express or implied, precludes his off-set. *Henniss* vs. *Page*, 3 Wh. 275; *Bank of U. S.* vs. *Macalester*, 9 Barr, 475. It has been urged, however, that though a contract not to defalcate against the company may be, there is nothing from which a contract not to avail himself of his set-off against a creditor coming on the funds by process in *mortum*, and having no better equity to be paid than himself, can be implied.

But how is this distinction to be practically carried out? It is clear that the company could demand the debt of General Reed for any purpose—he could not take defence, as to them, that they meant with the money to pay the plaintiff. The attachment places the judgment creditor in the shoes of the debtor, with all his rights and privileges, just as he stood at the date of the attachment; it is to all intents and purposes a *statute* assignment of the debt by the defendant to the plaintiff in the execution. *In re Baldwin's Estate*, 4 Barr, 248.

Rule discharged, and judgment for plaintiff.